

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JED GORDON,

No. C 03-0776 PJH (JL)

Plaintiff,

v.

**DISCOVERY ORDER**  
**Granting in part Docket # 34**

CITY & COUNTY OF SAN FRANCISCO,  
ET AL.,

Defendants.

**Introduction**

Plaintiff's motion to compel further production of records came on for hearing on April 28, 2004. Michael Sorgen appeared for Plaintiff. Assistant City Attorney Scott Wiener appeared for Defendant City and County of San Francisco and the individual defendants. The Court considered the pleadings and oral argument of counsel and hereby grants the motion, to the extent that Defendants shall produce all responsive documents to the Court for *in camera* review within twenty days of the date of the receipt of this order.

**Factual Background**

May 18 2002, Plaintiff hosted a party to celebrate his twenty-fifth birthday at his home at 1588 Hayes street. May 19, at approximately 3 a.m., police officer Latanya Briggs responded to a report of a street fight that originated in Plaintiff's home. The parties

1 acknowledge differences of opinion over the facts of the case. Plaintiff claims Officer Briggs  
2 called in a Code 4, to computer assisted dispatch, that there was no longer a situation  
3 requiring law enforcement intervention.

4 Officers Robert Duffield and Christa Peters arrived to back up Officer Briggs.  
5 Defendants state that upon arriving at the residence, they observed that Plaintiff was drunk,  
6 belligerent, hostile, and resisted arrest. Defendants assert that any harm Plaintiff suffered was  
7 the result of his spirited resistance to lawful police conduct.

8 According to Plaintiff, police illegally invaded his home and used excessive force to  
9 unlawfully arrest him. Plaintiff states he was hosting a quiet party and that he was not  
10 intoxicated. He claims one officer struck him on the back of the legs with her baton, knocking  
11 him to the ground, and five officers held him face down on the pavement. He suffered severe  
12 abrasions on his forehead and nose, bruises on his arms and a bloody nose. Defendants  
13 claimed he injured himself resisting the police. He alleges physical and emotional harm as a  
14 result of the arrest.

15 No charges were filed against Plaintiff for this incident.

### 16 **Procedural Background**

17 January 10, 2003, Plaintiff filed this action in the Superior Court of California, in and for  
18 the City and County of San Francisco. The complaint alleged violations arising under  
19 California state law for assault, battery, false arrest and false imprisonment, and 42 U.S.C. §  
20 1983, for excessive force, false arrest, and false imprisonment. February 24, 2003,  
21 Defendant removed the action to Federal Court pursuant to 28 U.S.C. §§ 1441 and 1446.  
22 March 17, 2003, the clerk reassigned the case to Judge Hamilton. Jury trial in this matter is  
23 set for November 1, 2004. On March 19 Plaintiff filed this motion for further production of  
24 records.

### 25 **The Discovery Dispute**

26 This discovery dispute arose following Defendants' refusal to produce documents  
27 Plaintiff requested on October 8, 2003, (Sorgen Declaration at Ex. 1) including the Office of  
28 Citizen Complaints ("OCC") files and portions of the personnel files of the individual

1 defendants and their performance evaluations. Plaintiff agrees to *in camera* review of the  
2 documents, redaction of personal information and production subject to a protective order.

3 Plaintiff requested “use of force” logs (Request # 1); documents transcribing or related  
4 to all CADs (computer-assisted dispatches regarding Plaintiff’s address dating back to 1998  
5 including those by Officer Latanya Briggs on May 19, 2002 (Request # 2); documents  
6 regarding “zones” of the human body where force may be applied (Request # 3); personnel,  
7 EEO and employee relations files of the three defendant officers, including OCC complaints  
8 and lawsuits (Request # 4- Duffield, Request # 5 - Peters, Request # 6 - Briggs). Plaintiff has  
9 withdrawn all discovery requests for Officer Briggs. (Per counsel at the hearing on this  
10 motion).

11 Defendants agreed to produce use-of-force log entries as to Officer Duffield only;  
12 documents related to CADs (computer-assisted dispatches) to 1588 Hayes Street # 1 for six  
13 months previous to the request; the City’s General Order regarding use of force, and any  
14 documents regarding zones of the human body where force may be applied. (Sorgen  
15 Declaration at Ex. 3)

16 Defendants objected to the remainder of Plaintiff’s requests, including the requests for  
17 documents from officers’ personnel files and OCC files, on grounds of vagueness and  
18 overbreadth and their intent to move the trial court to bifurcate and stay trial of Plaintiff’s claim  
19 under *Monell* until the claims against the individual defendants had been adjudicated.

20 Citing California statutory authority, Defendants objected to production of OCC files  
21 and the officers’ performance evaluations from their personnel files on the following grounds:

- 22 1) violation of the officers’ privacy and dignity,
- 23 2) compromising the safety and security of [the] officers and their families,
- 24 3) setting a precedent undercutting morale of the Police Department,
- 25 4) compromising the review process, and
- 26 5) extreme burden on the Defendants. (See Declaration of Lieutenant Charles J.  
27 Keohane, “Keohane Decl.”)
- 28

February 3, 2004, the parties met and conferred. During this conference, the parties limited the scope of the discovery. Defendants assert the official information privilege and the privacy interests of the individual defendants, and refuse to produce the personnel files and OCC documents. Plaintiff maintains these documents are relevant to his claim, and the public interest in disclosure outweighs Defendants' stated reasons for refusal to produce the documents.

### Legal Analysis

Rule 26, Federal Rules of Civil Procedure, permits a party to discover any relevant, non-privileged documents.

Plaintiff contends that the OCC files and performance evaluations of defendant officers Duffield and Peters are "absolutely necessary to adequately litigate plaintiff's civil rights case." Plaintiff offers his federal and state law claims for excessive force, false arrest, and false imprisonment as justification for disclosure of the documents he requests. Plaintiff contends that his claims and the public interest in assuring lawful police behavior warrant disclosure. The documents Plaintiff seeks contain information about the officers' performance, conduct, and behavior which are relevant to their credibility, history and patterns of behavior, as well as any previous notice to SFPD of misconduct, any ratification of their conduct by SFPD and the motive of the individual officers. *Soto v City of Concord*, 162 F.R.D. 603, 614-15, 620 (N.D. Cal. 1995). Plaintiff contends he cannot obtain the information from any other source. *Id.* at 616.

Defendants oppose Plaintiff's motion, offering instead to provide only copies of any complaints to the Office of Citizen Complaints ("OCC") against the officer-defendants that allege false arrest, false imprisonment, or excessive force. Defendants know of no sustained complaints against the officers, and no record of discipline aside from an admonishment for not attending a physical education training, and lateness turning in an assignment.

Defendants offer the affidavit of Lieutenant Charles Keohane, Commanding Officer of the Legal Division of the SFPD. Lt. Keohane personally reviewed the personnel files of Officers Robert Duffield, Christa Peters, and Latanya Briggs, as well as their OCC files. The

1 files contain no indication that the officers have been disciplined, and no “sustained” OCC  
2 complaints – that is, complaints which the OCC determined were meritorious. Nor do any of  
3 the files contain any reference to the incident giving rise to this lawsuit. (Separate Decl. Of  
4 Lieutenant Charles J. Keohane).

5 In a second declaration, at Ex. 2 to the Declaration of Michael Sorgen, Lieutenant  
6 Keohane asserts that pertinent statutes from the California Penal Code (sections 146e, and  
7 1328.5) and Vehicle Code section 1808.4 explicitly recognize that disclosure of personal  
8 information about law enforcement officers can jeopardize their safety and that of their  
9 families, and require a showing of good cause for such disclosure.

10 Lt. Keohane asserts that disclosure could have “severe consequences,” because the  
11 officers would feel insecure about the safety of themselves and their families. Morale would  
12 suffer. Disclosure would set a “terrible precedent.” Disclosure of performance evaluations  
13 would compromise the integrity of the review process. The objectives of measures intended to  
14 improve performance would not be served when the evaluations could be used for purposes  
15 outside their intended purpose and scope.

16 Lieutenant Keohane expressed similar concerns about disclosing the officers’ OCC  
17 files. Such revelations would curtail, if not destroy the SFPD’s ability to investigate its own  
18 officers. Confidentiality is a necessity. It would also be extremely burdensome to produce the  
19 complete files.

20 In the alternative, Defendants ask the Court to conduct an *in camera* review of  
21 responsive records and if the Court orders disclosure, that a protective order be entered. This  
22 would preclude disclosure or dissemination of the records for any purpose other than this  
23 lawsuit, that they be available to plaintiff’s counsel only, and that all documents be returned  
24 upon the conclusion of this lawsuit. Defendants also request redaction of such personal  
25 information as each officer’s social security number, driver’s license number, and address.

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## Conclusion

Discovery disputes of this nature involve balancing several competing factors. State statutory rules are sometimes at odds with federal common law, and the broad permission of discovery under the Federal Rules of Civil Procedure collides with private and police departmental privileges. The Federal Courts must balance all of the competing interests while promoting the interests of justice. Fortunately, the law is clear on these issues, and production of documents subject to *in camera* review and a narrow protective order should successfully safeguard the needs of the litigants, the SFPD and the public.

The United States District Court for the Northern District of California “determined that ‘[i]n federal question cases, privileges are determined under federal common law.’” *Soto v. City of Concord*, 162 F.R.D. 603, 609 n. 2 (N.D. Cal. 1995). (Internal citations omitted). The court in the *Soto* case held that a party or entity asserting a claim of the official information privilege must submit an affidavit to support its claim to justify submission of requested documents to the court for *in camera* review. Failure to provide an adequate affidavit waives the privilege and justifies production of the requested documents, if they also meet the threshold test for relevance.

The affidavit must include:

"(1) an affirmation that the agency generated or collected the material in issue and has maintained its confidentiality;

(2) a statement that the official has personally reviewed the material in question;

(3) a specific identification of the governmental or privacy interests that would be threatened by disclosure of the material to plaintiff and/or his lawyer;

(4) a description of how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to significant governmental or privacy interests, and

(5) a projection of how much harm would be done to the threatened

1 interests if disclosure were made."

2 *Id.* at 613. Quoting *Kelly v. City of San Jose*, 114 F.R.D. 653, (N.D.  
3 Cal.1987).

4 Neither of Lieutenant Keohane's two affidavits satisfy the elements articulated in *Soto*.  
5 His first affidavit fails parts 4 and 5. The second affidavit fails parts 3, 4, and 5.

6 A stronger affidavit would have explained how the plaintiff could acquire the information  
7 from other sources without undue burden or expense. *Taylor v. Los Angeles Police Dept.*,  
8 1999 WL 33101661, \*5 (C.D. Cal. 1999). More important, to successfully oppose disclosure,  
9 the affiant would have to explain why a protective order would not adequately prevent a  
10 substantial risk of harm to significant governmental or privacy interests. *Soto v. City of*  
11 *Concord*, 162 F.R.D. at 603. Generalized claims of harm without reference to the mitigating  
12 effect of a protective order, do not outweigh the plaintiff's interest in disclosure. *Chism v*  
13 *County of San Bernardino*, 159 F.R.D. 531, 534 (C.D.Cal. 1994).

14 Police officers have a limited right of privacy, given their status as public servants and  
15 the public's interest in monitoring their behavior. A protective order and redaction of personal  
16 information can adequately protect their privacy rights and their families, *King v. Conde*, 121  
17 F.R.D. 180 at 190-191 (E.D.N.Y. 1988) (finding plaintiffs "presumptively entitled" to documents  
18 involving prior complaints and police history).

19 Defendants fail to argue effectively how the existence of a *Monell* claim militates  
20 against providing Plaintiff with relevant information about the individual officers at this time.

21 Plaintiff adequately asserts the relevance of the documents, and Defendants fail to  
22 show what harm would result from production, given an appropriate protective order and  
23 redaction of personal information.

24 Accordingly, the Court hereby orders the files for Officers Duffield and Peters to be  
25 produced to the Court for *in camera* review, within twenty days of receipt of this order. After  
26 the review, the Court will order production of relevant non-privileged documents subject to a  
27 protective order and with personal information redacted. While the Court is conducting *in*  
28 *camera* review, the parties shall draft an appropriate protective order.

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IT IS SO ORDERED.

DATED: April 30, 2004

/s/ James Larson

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JAMES LARSON  
United States Magistrate Judge